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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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JUN 17 1996

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )

Implementation of Section 34(a)(1) of the )  
Public Utility Holding Company Act of 1935, )  
as added by the Telecommunications Act )  
of 1996 )

GC Docket No. 96-101

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COMMENTS OF AMERICAN COMMUNICATIONS SERVICES, INC.

Respectfully submitted,

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Dated: June 17, 1996

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## **SUMMARY**

ACSI is a CLEC which currently is constructing a total of 50 local fiber optic distribution networks across the United States. Access to poles, ducts, conduit and rights-of-way owned or controlled by incumbent Utilities often is key to the timely construction of an efficient local telecommunications network. These are critical bottleneck facilities which have historically been made available for use by incumbent LECs. ACSI has been actively engaged in efforts to obtain access to such Utility rights-of-way for the past few years in order to begin competing head-on with such ILECs.

Unfortunately, some Utilities have resisted ACSI's entreaties. Some have delayed acting on ACSI's request for access, while others have demanded that ACSI pay far more for access than the amount required of ILECS or CATV firms. The situation has worsened materially as Utilities have become interested in entering the telecommunications business. Utilities with ETC affiliates have delayed action on ACSI's requests for access to rights-of-way until their ETC affiliates are established, or are demanding compensation from ACSI which the Company believes is not required of ETC affiliates. Indeed, ACSI believes that some ETC operations are being cross-subsidized through preferential right-of-way arrangements obtained from their Utility affiliates.

The 1996 Act was intended to eliminate bottlenecks in the local telecommunications industry, not create them. While ETC participation in the telecommunications market could provide an important source of new competitors, ETC status should not serve as a pretext for

the entrance of a new generation of monopolies into the telecommunications market, or for the rise of unfair competition from cross-subsidized monopoly affiliates.

ACSI suggests strongly that the Commission's proposals for ETC certification be modified to ensure that their Utility affiliates comply with their obligations under Section 103 of the 1996 Act to provide nondiscriminatory access to rights-of-way for all telecommunications carriers. A responsible officer of the Utility should be required to attest to this fact in the application itself. In addition, all rights-of-way agreements between Utilities and ETC affiliates should be publicly-filed, and all telecommunications carriers should be allowed access to such rights-of-way on the same terms and conditions. No ETC should be certified which is unable or unwilling to provide proof of the compliance of its Utility affiliate with its nondiscrimination obligations. Finally, ETC status should be revoked if its Utility affiliate later refuses to provide nondiscriminatory access to its rights-of-way.

The desire to avoid undue delay in the processing of ETC applications is understandable. But the FCC cannot turn a blind eye to the abusive and anti-competitive behavior in which some Utilities already are engaged. The ETC certification process can and should be used as a convenient tool for the FCC to prevent collusive behavior between ETCs and their Utility affiliates to the detriment of all other telecommunications carriers.

## TABLE OF CONTENTS

SUMMARY .....	i
Introduction .....	Page 1
I. ETCs Should Be Required to Demonstrate That Their Utility Affiliates Grant Nondiscriminatory Access to Critical Rights-of-Way. ....	Page 3
II. Interested Parties Should Be Permitted to Comment on Anticompetitive Activities of the Applicants Utility Affiliates. ....	Page 9
Conclusion .....	Page 11
PROPOSED RIGHT-OF-WAY REQUIREMENTS .....	ATTACHMENT A
REVISED DRAFT REGULATIONS .....	ATTACHMENT B
DEMOCRAT GAZETTE ARTICLE .....	ATTACHMENT C

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Public Utility Holding Company Act of 1935, )  
as added by the Telecommunications Act )  
of 1996 )

**COMMENTS OF AMERICAN COMMUNICATIONS SERVICES, INC.**

American Communications Services, Inc. ("ACSI"), by its attorneys, hereby comments on the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding.<sup>1</sup>

**Introduction**

ACSI, a publicly-traded Delaware corporation, through its operating subsidiaries, provides competitive local access and exchange services. ACSI is headquartered in Annapolis Junction, Maryland and currently has nearly 200 employees. The company constructed its first local fiber optic network in 1994. At present, ACSI has fifteen

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<sup>1</sup> FCC 96-192 (released April 25, 1996).

operational networks and seven additional networks under constructions.<sup>2</sup> ACSI plans to have 30 local networks in service or under construction by the end of the third calendar quarter of 1996, and have 50 local distribution networks in service or under construction by the middle of calendar year 1998.

ACSI is building its own fiber optic networks in the markets it serves. As a result, access to poles, ducts, conduit and rights-of-way owned or controlled by incumbent utility companies (Utilities) and incumbent local exchange carriers (ILECs) is critical. Without access to such facilities on a nondiscriminatory basis, ACSI and other competitive local exchange companies (CLECs) will be severely disadvantaged in their efforts to compete against the ILECs and "exempt telecommunications companies" (ETCs)<sup>3</sup> in the emerging market for competitive local telecommunications services.

ACSI strongly urges the Commission to employ the ETC certification process in part to ensure that the ETCs' Utility affiliates do not undermine the development of local

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<sup>2</sup> ACSI's currently operational networks are located in Albuquerque, NM; Birmingham, AL; Charleston, SC; Columbus, SC; Fort Worth, TX; El Paso, TX; Greenville, SC; Irving, TX; Las Vegas, NV; Lexington, KY; Little Rock, AR; Louisville, KY; Mobile, AL; Montgomery, AL; and Tucson, AZ. ACSI expects to have networks in the following cities operational by September 30, 1996: Amarillo, TX; Baton Rouge, LA; Birmingham, AL; Charleston, SC; Columbus, GA; Irving, TX; Jackson, MS; Las Vegas, NV; and Spartanburg, SC.

<sup>3</sup> An ETC is "any person determined by the Federal Communications Commission to be engaged directly or indirectly, wherever located, through one or more affiliates (as defined in section 2(a)(11)(B) [of PUHCA]), and exclusively in the business of providing -- (A) telecommunications services; (B) information services; (C) other services or products subject to the jurisdiction of the Federal Communications Commission; or (D) products or services that are related or incidental to the provision of a product or service described in subparagraph (A), (B), or (C) " Telecommunications Act of 1996 § 103, Pub. L. No. 104-104, 110 Stat. 56 (1996).

competition by denying competitors access to essential facilities. As affiliates of ETCs, Utilities have an inherent incentive to discriminate against non-affiliated telecommunications carriers -- particularly with reference to establishing prices for access to poles, conduits, ducts and rights-of-way. As discussed hereinafter, the Commission must consider whether a Utility is fulfilling its obligation to provide nondiscriminatory access to poles, ducts, conduits and rights-of-way<sup>4</sup> before granting ETC status to a Utility's affiliate.

**I. ETCs Should Be Required to Demonstrate That Their Utility Affiliates Grant Nondiscriminatory Access to Critical Rights-of-Way.**

In the NPRM,<sup>5</sup> the Commission proposes to require applicants for ETC status to provide a brief description of their planned activities and a sworn statement certifying their compliance with the express statutory requirements included in Section 103<sup>6</sup> of the 1996

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<sup>4</sup> See 47 U.S.C. § 224.

<sup>5</sup> NPRM ¶ 10.

<sup>6</sup> Under the proposed rules an applicant would have to provide a brief description of the planned activities of the company or companies which are eligible companies owned and/or operated by the applicant. In addition, the applicant would have to file a sworn statement, by a representative legally authorized to bind the applicant, attesting to any facts or representations presented to demonstrate eligibility for ETC status, including a representation that the applicant is engaged directly, or indirectly, wherever located, through one or more affiliates, and exclusively in the business of providing (A) telecommunications services; (B) information services; (C) other services or products subject to the jurisdiction of the Commission; (or) products or services that are related or incidental to the provision of a product or service described in (A), (B), or (C). Finally, the applicant would have to provide a sworn statement, by a representative legally authorized to bind the applicant, certifying that the application satisfies Part I, Subpart P, of the Commission's regulations, 47 C.F.R. §§ 1.2001 *et seq.* regarding the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 862.

(continued...)

Act.<sup>7</sup> Relying on the system created by FERC to certify "exempt wholesale generator[s]" as a model, the Commission proposes to make processing of ETC applications a largely ministerial function which is limited to evaluation of whether the applicant has filed each of the items on a prescribed checklist. Under the FCC's proposal, there would be no consideration of the "public interest merits" of entry by the applicant."<sup>8</sup> The Commission sought comment on two related issues: (1) whether its interpretation of the scope of its inquiry under Section 34(a)(1) is correct,<sup>9</sup> and (2) whether its inquiry should be either more expensive or narrow.<sup>10</sup>

ACSI agrees with the Commission that ETCs have the potential to become "vigorous competitors in the telecommunications industry,"<sup>11</sup> and that the ETC application approval process should not be made so cumbersome that it would unduly retard or delay market entry. Nevertheless, the Commission must also be mindful of the larger purposes of the 1996 Act; namely, creation of an environment in which a multiplicity of firms can compete

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<sup>6</sup>(...continued)

Upon filing, the application would be put on public notice for comment on the adequacy or accuracy of the representations contained therein. The Commission would review the application and comments for the sole purpose of determining whether the application meets the statutory requirements for ETC status. NPRM at ¶ 10.

<sup>7</sup> Section 103 of the 1996 Act adds a new Section 346(a)(1) of the Public Utility Holding Company Act of 1935 (PUHCA), 15 U.S.C. § 79, *et seq.*

<sup>8</sup> NPRM ¶ 2.

<sup>9</sup> NPRM ¶ 8.

<sup>10</sup> NPRM ¶ 0.

<sup>11</sup> NPRM ¶ 7.



on equal terms in the local telecommunications marketplace. Thus, the Commission must take care when approving applications for ETC status that it does not unknowingly create incentives for the applicants' Utility affiliates to discriminate against other market entrants. Similarly, the Commission must ensure that ETCs do not compete unfairly, as the beneficiaries of a cross-subsidy flowing from their Utility affiliates in the form of preferential right-of-way agreements.

The problem stems from the fact that Utilities often own or control the poles, conduit, duct space or similar rights-of-way which are critical to the expeditious and efficient deployment of local telecommunications networks. Construction of CLEC networks cannot begin until the company secures adequate rights-of-way and pole, conduit or duct space to house its fiber-optic cabling. Such rights-of-way usually are in short supply and the best routes often are controlled by the incumbent Utilities. Obtaining access to these bottleneck facilities on nondiscriminatory terms is essential for ACSI and other CLECs to provide local network services economically. Unfortunately, many Utilities have been reluctant to provide access to CLECs on reasonable terms -- a problem which can only be compounded when Utility affiliates (*i.e.*, ETCs) become direct competitors to CLECs in the provision of local telecommunications services. The obvious temptation is for Utilities to use their unique access to rights-of-way to confer a competitive advantage upon their ETC affiliates.<sup>12</sup>

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<sup>12</sup> The symbiotic relationship between Utilities and their ETC affiliates cannot be ignored. For example, Entergy Corp. recently announced that its FCC-approved ETC will compensate each Entergy state electric utility based upon profits it realizes from leasing fiber optic lines in their states. *See* Attachment C hereto. The fact that Entergy electric utilities profit directly from operations conducted by the Entergy ETC creates a strong incentive for them to discriminate against CLECs such as ACSI.

Congress attempted to address this dilemma in the 1996 Act by imposing a new statutory duty upon Utilities to grant all telecommunications carriers nondiscriminatory access to their rights-of-way. Specifically, Section 703 of the 1996 Act creates a new Section 224(f) of the Communications Act which provides that a "Utility shall provide. . .any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it."<sup>13</sup> The importance of this newly created obligation cannot be overstated. Utility control over these essential bottleneck facilities is the product of many years use of both Utility eminent domain rights and investment of monopoly revenue streams. This experience cannot be repeated by new entrants in a competitive marketplace. Thus, the FCC has correctly observed that access to the Utilities' rights-of-way "is vital to the development of local competition, because it ensures that competitive providers can obtain access to facilities necessary to offer service."<sup>14</sup>

As a major developer of alternative local fiber optic networks, ACSI has considerable recent experience in attempting to obtain access to Utility rights-of-way. ACSI has found that the majority of Utilities have been cooperative and reasonable. Indeed, ACSI has entered into important strategic relationships with several of them. However, on too many occasions, selected Utilities have employed obstructionist tactics to delay ACSI's access to critical rights-of-way indefinitely, or afford such access only on uneconomic terms. Examples include:

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<sup>13</sup> 47 U.S.C. § 224(f).

<sup>14</sup> CC Docket 96-98, *Notice* ¶ 220.

- \* Pole attachment and conduit access rates offered by Utilities often are market-based, and far exceed rates which would result from the use of any reasonable cost-based pricing methodology.
- \* Rates charged by Utilities to CLECs often far exceed those charged to ILECs.
- \* Rates charged to CLECs commonly are 50-400 percent higher than rates charged to CATV providers<sup>15</sup> for access to the same facilities.
- \* Utilities have contended that poles lack sufficient capacity to afford access to certain competitors, even when space is reserved for their own future use, or other (favored) carriers are given access.
- \* Utilities have refused to negotiate or implement right-of-way agreements until after they form operational ETC affiliates.

A poignant illustration of the problem is provided by ACSI's own experience in attempting to obtain access to rights-of-way controlled by a major electric Utility which recently applied to the FCC for authority to provide service as an ETC. ACSI first requested access more than 18 months ago. After considerable coaxing, the Utility provided a draft agreement more than a year later, but without any proposed pricing. ACSI inserted price terms which significantly exceeded the amount charged by the Utility to CATV providers, and returned a signed agreement without further revision. The Utility then refused to execute its own proposed agreement. Clearly, the lack of good faith -- and anticompetitive conduct -- demonstrated in this instance cannot be tolerated of any telecommunications carrier, including an ETC.

Another electric Utility has refused to provide pole attachments until ACSI agrees, (1) to pay rates approximately 400 percent higher than rates collected by it from CATV

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<sup>15</sup> Including CATV providers that offer local telecommunications services.

providers, and (2) waive its right to file any complaint at the FCC, now or in the future, against the Utility concerning its rates. The electric Utility informed ACSI that it does not recognize the FCC's authority in this area. Under the Utility's interpretation of the 1996 Act, ACSI's recourse is limited to the filing of an "eminent domain" action in state court. Such rogue behavior simply must not be permitted to continue.

More recently, ACSI has found that Utilities are consciously delaying entering right-of-way agreements with CLECs until after their ETCs are approved, established and even publicized.

To resolve this dilemma, in its comments filed in CC Docket 96-98, ACSI urged the FCC to immediately adopt rules that both define the substantive obligations of Utilities to provide access to poles, ducts, conduit and rights-of-way, *and* establish expedited procedures that CLECs and other interconnectors can employ to enforce their rights. The specific requirements proposed by ACSI to implement Section 703 are appended hereto as Attachment A for the convenience of the Commission, and the swift implementation of such a regulatory framework in the surest way to ensure that the emerging pattern of Utility discrimination against CLECs is cured.

Nonetheless, the Commission cannot ignore the relevance of these issues to the ETC certification process. Simply put, a Utility should not be afforded the privilege of entering the telecommunications market through an ETC affiliate until it affirmatively demonstrates its compliance with the legal duties conferred upon it by Section 703 of the 1996 Act. This does not have to be an onerous or burdensome process. ACSI believes that, by adding the

following modest modifications to the FCC-proposed ETC certification process, the FCC can ensure that all telecommunications carriers benefit from the mandate of Section 703:

- \* Similar to the certification requirement established in the FCC's rules regarding compliance with the Anti-Drug Abuse Act of 1988, the applicant's Utility affiliate should be required to certify that it has and will comply with Section 703 of the 1996 Act by providing nondiscriminatory access to its poles, ducts, conduit and rights-of-way to all telecommunications carriers.
- \* ETCs should be required to provide copies to any requesting telecommunications carrier of any agreement between the ETC and any Utility affiliate thereof which affords the ETC access to any Utility poles, ducts, conduit or rights-of-way.
- \* An applicant's ETC status should be expressly conditioned on the continuing willingness of the ETC's Utility affiliate to provide nondiscriminatory access to its poles, ducts, conduit and rights-of-way, and ETCs should be expressly forewarned that their ETC status can be revoked if their Utility affiliate fails to satisfy this obligation.

ACSI has prepared proposed modifications to the Commission's draft regulations which would implement its suggestions and included them herewith as Attachment B. Importantly, the proposed changes would not in any way restrict or delay market entry by ETCs whose Utility affiliates are complying with the requirements of Section 703. However, they would provide important protection to other telecommunications carriers that seek to compete with the ETCs. Moreover, the proposed changes are plainly consistent with the pro-competitive purposes of the 1996 Act. Through enactment of Sections 251(b)(4)<sup>16</sup> and 703, Congress made clear its intent that existing Utility rights-of-way be made generally available to all competitors on equal terms. ACSI's requested modifications simply

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<sup>16</sup> 47 U.S.C. § 251(b)(4). This section imposes a duty upon ILECs to provide nondiscriminatory access to poles, ducts, conduit and rights-of-way.

implement this edict with respect to ETC Utility affiliates -- where the incentive to discriminate is particularly acute -- in non-intrusive terms. ACSI respectfully requests that the Commission revise its proposed rules accordingly.

**II. Interested Parties Should Be Permitted to Comment on the Anticompetitive Activities of the Applicants Utility Affiliates.**

The Commission also asked whether comments on ETC applications should be limited to the adequacy and accuracy of the representations contained therein.<sup>17</sup> The proposed rules provide for public notice and comment on ETC applications, but limit consideration of any submission made in response to the adequacy or accuracy of the representations made in the application. The Commission has stated that "[g]iven the limited focus of the Commission's inquiry under Section 34(a)(1), the Commission does not believe that it is appropriate to allow commenters to raise issues that fall outside the purview of the statutorily fixed determination, and that go to the public interest merits of an applicant's proposed entry."<sup>18</sup>

ACSI strongly disagrees. The Commission should also consider whether granting ETC status to a particular Utility affiliate will serve the public interest in fostering effective local competition. If the Commission does not consider substantive issues raised by an application, it reduces its function to that of a rubber stamp and renders the entire process

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<sup>17</sup> NPRM at ¶ 13.

<sup>18</sup> *Id.*

meaningless. The Commission should not limit comments on ETC applications to whether the applicant adequately made certain superficial recitations. Specifically, the Commission should entertain submissions that discuss whether the applicants' Utility affiliates are fulfilling their legal obligation to provide nondiscriminatory access to their poles, ducts, conduit and rights-of-way.

Finally, the Commission should give ETC commenters at least 30 days from public notice to file comments. ACSI believes that the 15 day interval suggested by the Commission is inadequate to allow interested parties to investigate and comment meaningfully on ETC applications. Allowing 30 days would give commenters a fair opportunity to develop comments while not unduly delaying the processing of such applications.

## **Conclusion**

ACSI respectfully suggests that the Commission revise its proposed rules as set forth in Attachment B hereto. ETC status is a privilege which should be granted only where a Utility can demonstrate that it is making its facilities available on a nondiscriminatory basis as required by Section 703 of the 1996 Act. The fact that some Utilities are willing to discriminate against CLECs in the provision of essential facilities such as poles, conduits, ducts and rights-of-way is evident. The Commission must take steps to ensure that the situation is not made worse by creating new incentives to discriminate in favor of ETC affiliates.

Respectfully submitted,

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June 17, 1996



## **ATTACHMENT A**

### **PROPOSED RIGHT-OF-WAY REQUIREMENTS**

Section 703 of the 1996 Act requires that Utilities afford all telecommunications carriers nondiscriminatory access to their poles, conduit, ducts and rights-of-way. In its comments in CC Docket 96-98, ACSI urged the FCC to adopt rules that accomplish each of the following:

- \* Rules should apply equally to all ILECs, electric utilities, other incumbent utility companies *and* their affiliates.
- \* Applicants for ETC status must affirmatively demonstrate that both they *and* their affiliates<sup>1</sup> provide access to right-of-way to all competitors on a nondiscriminatory basis.
- \* ILECs and Utilities must respond to bona fide requests for access to poles, ducts, conduit and right-of-way within 10 business days of receipt, with written reasons stated for any refusal to provide access, and access generally should be made available within 30 days thereafter.
- \* Access must be provided to *all* poles, ducts, conduits and right-of-way *owned or controlled* by the incumbent, including building risers and vault access/building entrance where such facilities are under the incumbent carrier's control.
- \* Access must be provided on identical terms (including rates) to all CLECs, CATV providers and other telecommunications providers.

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<sup>1</sup> ETCs should not be able to shirk this responsibility by stating that the poles, conduit or right-of-way at issue belong to a regulated parent or unregulated affiliate. At a minimum, CLECs should be able to obtain right-of-way on the same terms as such right-of-way is made available to an ETC by its affiliate.

- \* Access must be provided on the same terms that the ILEC or Utility applies to itself or an affiliate for similar uses.
- \* All agreements executed prior to the 1996 Act may be voided by the CLEC, and renegotiated subject to the terms of the 1996 Act.<sup>2</sup>
- \* When access is refused, the ILEC or Utility has the burden of proving by a preponderance of the evidence that "insufficient capacity" exists or that access was denied for "reasons of safety, reliability and generally applicable engineering purposes."<sup>3</sup>
- \* Rules should clarify that sufficient capacity exists to provide competitive access if any presently unused capacity exists, that space may not be reserved by the ILEC or Utility for their own future use, and where space is limited, available space must be allocated equitably among all telecommunications carriers requesting access.
- \* Denials for reasons of safety, reliability and engineering purposes must rest on generally accepted and published industry engineering criteria or technical standards, and reasons for denial must be applied consistently to all telecommunications carriers, including the ILEC or Utility and its affiliates.
- \* Complaints or petitions alleging violations of these requirements should be resolved by the FCC within 90 days of filing, and the ILEC or Utility should have the burden of proving that the rates, terms and conditions of access are just, reasonable and nondiscriminatory.
- \* All ILECs and Utilities should file periodic reports of the number of right-of-way agreements entered by them, and descriptions of the basic terms of each such agreement.

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<sup>2</sup> Pre-1996 Act agreements were negotiated in an era when no statutory right-of-access existed, and carriers that lacked any bargaining leverage often were forced to accept contracts of adhesion. ACSI suggests that the FCC establish a six-month "fresh look" period, during which period CLECs may terminate and renegotiate their existing right-of-way agreements.

<sup>3</sup> 47 U.S.C. § 224(f)(2). See CC Docket 96-98 Notice ¶ 222.

## **ATTACHMENT B**

### **REVISED DRAFT REGULATIONS<sup>1</sup>**

#### **CODE OF FEDERAL REGULATIONS**

##### **TITLE 47 -- Telecommunications**

##### **Creates New Part 1, Subpart S**

### **EXEMPT TELECOMMUNICATIONS COMPANIES**

#### **§ 1.4000 Purpose.**

The purpose of Part 1, Subpart S, is to implement section 34(a) of the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79 *et seq.*, as added by section 103 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

#### **§ 1.4001 Definition.**

- (a) For the purpose of this part, the terms "telecommunications services" and "information services" shall have the same meanings as provided in the Communications Act of 1934, as amended;
- (b) Commission shall be defined as the Federal Communications Commission; and
- (c) "ETC" shall be defined as an exempt telecommunications company.

#### **§ 1.4002 Contents of Application and Procedure for Filing.**

(a) A person seeking status as an exempt telecommunications company (applicant) must file with the Commission with respect to the company or companies which are eligible companies owned and/or operated by the applicant, and serve on the Securities and Exchange Commission and any affected State commission, the following:

- (1) A brief description of the planned activities of the company or companies which are or will be eligible companies owned and/or operated by the applicant;

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<sup>1</sup> Proposed deletions are crossed-through. Proposed additions are in bold-face type and double underscored.

(2) A sworn statement, by a representative legally authorized to bind the applicant, attesting to any facts or representations presented to demonstrate eligibility for ETC status, including a representation that the applicant is engaged directly, or indirectly, wherever located, through one or more affiliates (as defined in section 2(a)(11)(B) of the Public Utility Holding Company Act of 1935), and exclusively in the business of providing:

- (A) Telecommunications Services;
- (B) Information services;
- (C) Other services or products subject to the jurisdiction of the Commission; or
- (D) Products or services that are related to incidental to the provision of a product or service described in paragraph (A), (B) or (C);

and

**(3) A sworn statement, by a representative legally authorized to bind any utility holding company affiliated with the applicant, certifying that such utility has and will continue to make all of its poles, ducts, conduit and rights-of-way immediately available to all telecommunications carriers that request access thereto subject to just, reasonable and nondiscriminatory terms, and particularly, without limitation, on terms and prices equivalent to those offered to the applicant.**

**(3)(4)** A sworn statement, by a representative legally authorized to bind the applicant, certifying that the applicant satisfies Part 1, Subpart P, of the Commission's regulations, 47 C.F.R. §§ 1.2001, *et seq.*, regarding implementation of the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 862.

#### **§ 1.4003 Effect of Filing.**

A person applying in good faith for a Commission determination of exempt telecommunications company status will be deemed to be an exempt telecommunications company ~~from the date of receipt of the application until~~ **after** the date of Commission action pursuant to § 1.4004.

**§ 1.4004 Commission Action.**

If the Commission has not issued an order granting or denying an application within 60 days of receipt of the application, the application will be deemed to have been granted as a matter of law.

**§ 1.4005 Nondiscriminatory Rights of Occupancy**

**The ETC has a duty to provide copies to any requesting telecommunications carrier of any agreement between the ETC and any utility affiliate thereof that affords the ETC access to any utility poles, ducts, conduit or rights-of-way. Copies must be provided within ten days of receipt of a bona fide request therefore. Failure by the ETC to produce copies of any such agreements, or failure by its utility affiliate to make access available to its poles, ducts, conduit or rights-of-way to other requesting telecommunications carriers upon the same terms and conditions, shall be grounds for immediate revocation of the company's ETC status. This requirement applies to all ETCs, including those granted prior to the adoption date hereof.**

**§ 1.4005 1.4006 Notification of Commission Action to the Securities and Exchange Commission.**

The Secretary of the Commission will notify the Securities and Exchange Commission whenever a person is determined to be an exempt telecommunications company.

**§ 1.4006 1.4007 Procedure for Notifying Commission of Material Change in Facts.**

If there is any material change in facts that may affect an ETC's eligibility for ETC status under section 34(a)(1) of the Public Utility Holding Company Act of 1935, the ETC must, within 30 days of the change in fact, either:

- (a) apply to the Commission for a new determination of ETC status;
- (b) file a written explanation with the Commission of why the material change in facts does not affect the ETC's status; or
- (c) notify the Commission that it no longer seeks to maintain ETC status.

**§ ~~1.4007~~ 1.4008      Comments.**

(a) Any person wishing to be heard concerning an application for ETC status may file comments with the Commission within ~~fifteen (15)~~ thirty (30) days from the release date of a public notice regarding the application, or such other period of time set by the Commission.

~~Any comments must be limited to the adequacy or accuracy of the application.~~

(b) Any person who files comments with the Commission must also serve copies of all comments on the applicant.

(c) An applicant has seven (7) days to reply to any comments filed regarding ~~the adequacy and accuracy of its application~~, or such other period of time as set by the Commission. Such reply shall be served on the commenters.

# Entergy has lines for rent — fiber-optic

BY ANDREW MOREAU  
Democrat-Gazette Business Writer

Entergy Corp. has put its fiber-optic lines up for rent.

The parent corporation of Entergy Arkansas Inc. has notified regulators in Arkansas and three other states that it will begin leasing excess capacity on its fiber-optic network.

"We'll allow other companies to use the benefits of our system, and we'll derive value from that," said Entergy spokesman Patrick Sweeney.

The roughly 1,000-mile network includes 145 miles of fiber in Arkansas. The network extends primarily from Little Rock to Jackson, Miss., before it drops down to New Orleans. From there it rolls across south Louisiana to Bryan, Texas.

Customers could use any part of the network to connect to another portion. So a Little Rock business could link with its Jackson, Miss., office and use the lines to send computer data, voice transmissions or even video.

"It could be anything from on-demand, pay-per-view movies to banking services," Sweeney said. "It's there for whatever way a customer wants to use it."

Each of Entergy's state utilities will be compensated on the basis of profits generated from the leasing of lines in those states. Entergy Arkansas Inc., for example, would at most make 23 percent of the profits generated by the new program.

To lease the capacity, a new subsidiary called Entergy Technology Holding Co. has been formed, according to documents submitted to the Arkansas Public Service Commission. The company is based in Little Rock.

Another entity, Entergy Technology Co., will be a wholly owned subsidiary of Entergy Technology Holding and will help

See ENTERGY, Page 2D

## ATTACHMENT C

### Entergy

• Continued from Page 1D  
market the network.

The Federal Communications Commission in April approved formation of those operating companies. Though Entergy officials feel they need no further approval to begin leasing the lines, they did want to notify the state commissions of their intent to commercialize the network, according to Steve Dingle, regulatory affairs coordinator for Entergy Arkansas Inc.

Entergy filed documents with the Arkansas commission Wednesday afternoon noting that the new companies were going into business.

"To be honest, we really don't know if we need state approval," Dingle said. "In this new emerging telecommunications era, it's not really clear, but we think it's outside the commission's jurisdiction."

Commission officials were out of the office Friday and could not

be reached for comment.

At this point, Entergy officials have no firm idea how much business the subsidiary will attract. Yet Sweeney noted that Entergy uses only about 15 percent of available capacity for its own operations.

"I couldn't cite you a dollar figure, but obviously we think it's large enough and lucrative enough to enter into it," he said.

There are no plans to begin offering direct telecommunications services, according to Sweeney. "We would not be providing services to retail customers," he said. "We would simply provide bulk service."

Under the proposal, Entergy Technology Co. would compensate Entergy Arkansas Inc. to ensure that the electric utility doesn't have to pass any network cost to its customers.

Entergy Technology also will pay Entergy Arkansas a portion of the before-tax profits from the leasing operation. The same formula is established for other states.

## CERTIFICATE OF SERVICE

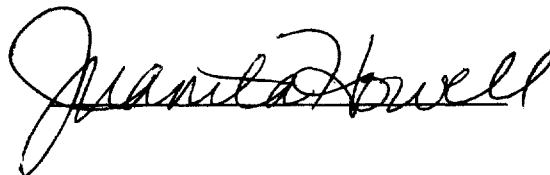
I do hereby certify that on this 17th day of June, 1996, a true and correct copy of the foregoing *Comments of American Communications Services, Inc.* was served via hand delivery to:

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Washington, D.C. 20554

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A handwritten signature in black ink, appearing to read "Juanita Howell". The signature is fluid and cursive, with a horizontal line drawn across the middle of the name.